

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ELIZABETH JENKINS,)	
)	No. CV-09-0294-CI
Plaintiff,)	
)	ORDER GRANTING PLAINTIFF'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	AND DENYING DEFENDANT'S
MICHAEL J. ASTRUE, Commissioner)	MOTION FOR SUMMARY JUDGMENT
of Social Security,)	
)	
Defendant.)	

BEFORE THE COURT are cross-Motions for Summary Judgment. (Ct. Rec. 12, 15.) Attorney Lora Lee Stover represents Plaintiff; Special Assistant United States Attorney Leisa A. Wolf represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 6.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment and remands the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

JURISDICTION

On July 2, 2007, Plaintiff filed for Supplemental Security Income benefits (SSI) and disability insurance benefits (DIB). (Tr. 155, 158.) She alleged disability due to hepatitis C, depression, acid reflux, allergies, asthma, irritable bowel syndrome (IBS) and bi-lateral carpal tunnel syndrome. (Tr. 177.) She alleged an onset date of December 31, 2004. (*Id.*) Benefits were denied initially

1 and on reconsideration. (Tr. 89, 90.) Plaintiff requested a
2 hearing before an administrative law judge (ALJ), which was held
3 before ALJ R. J. Payne on February 3, 2009; a supplemental hearing
4 was held on May 5, 2009. (Tr. 33-86.) Plaintiff, who was
5 represented by counsel, and medical experts David Rullman, M.D.,
6 and Ronald Klein, Ph.D., testified. (*Id.*) The ALJ denied benefits
7 and the Appeals Council denied review. (Tr. 1-5, 12-32.) The
8 instant matter is before this court pursuant to 42 U.S.C. § 405(g).

9 **STATEMENT OF THE CASE**

10 The facts of the case are set forth in detail in the transcript
11 of proceedings, and are briefly summarized here. Plaintiff was 38
12 years old on her alleged onset date and had an 11th grade education;
13 she did not have a high-school equivalency degree. (Tr. 182.) She
14 had vocational training as a food handler, a cashier/checker and
15 care giver. (*Id.*) She had limited work experience as a temporary
16 laborer, in home care giver, retail cashier, and food server. (Tr.
17 178, 72-75.) Plaintiff was unmarried and lived with her mother in
18 a two-story duplex. She reported she had no relationship with her
19 three children. (Tr. 290.) She stated her mother did most of the
20 household chores, although she did her own laundry once a month and
21 her mother would grocery shop with her three times a month.
22 Plaintiff also stated she slept 20 hours day, with short periods of
23 wakefulness during which she ate or watched television. (Tr. 66-
24 68.) She reported asthma, back and wrist pain, IBS, extreme fatigue
25 and side effects from medication prevented her from working or doing
26 other activities. (Tr. 77.)

ADMINISTRATIVE DECISION

ALJ Payne found Plaintiff met the insured status requirements through March 31, 2004. (Tr. 17.) At step one, he found Plaintiff had not engaged in substantial gainful activity since her alleged onset date. (*Id.*) At step two he found she had severe impairments of hepatitis C NOS; bilateral carpal tunnel syndrome; morbid obesity; and somatoform disorder, but they did not meet or medically equal an impairment listed in Appendix I, Subpart P, Regulations No. 4 (Listings). (Tr. 17, 21.) At step four, considering Plaintiff's testimony and the medical evidence, he found Plaintiff had a residual functional capacity (RFC) to perform a full range of medium work, as defined by the Regulations. (Tr. 22, 26.) He concluded Plaintiff's allegations of disabling symptoms were not credible to the extent they were inconsistent with the RFC findings. (Tr. 22-23.) He then found her past jobs were not performed at substantial gainful activity levels; therefore, there was no past relevant work for her to perform. (Tr. 26.) At step five, the ALJ found Plaintiff's limitations had "little or no effect on the occupational base of unskilled light work." (Tr. 26.) Referencing the Medical-Vocational Guidelines and using Rule 203.26 as a framework for his findings, the ALJ took judicial notice of historical and routine vocational expert testimony that limitations similar to Plaintiff's "would not significantly erode the job base at the sedentary job levels." (*Id.*) Based on this reasoning, he concluded "there are [sic] still a wide range of sedentary, light, and medium exertional level jobs" that Plaintiff was capable of performing. (Tr. 26-27.) He found Plaintiff had not been under a disability, as defined by

1 the Social Security Act, from her alleged onset date through the
2 date of his decision. (Tr. 27.)

3 STANDARD OF REVIEW

4 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
5 court set out the standard of review:

6 A district court's order upholding the Commissioner's
7 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
8 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
9 Commissioner may be reversed only if it is not supported
10 by substantial evidence or if it is based on legal error.
11 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
12 Substantial evidence is defined as being more than a mere
13 scintilla, but less than a preponderance. *Id.* at 1098.
14 Put another way, substantial evidence is such relevant
15 evidence as a reasonable mind might accept as adequate to
16 support a conclusion. *Richardson v. Perales*, 402 U.S.
17 389, 401 (1971). If the evidence is susceptible to more
18 than one rational interpretation, the court may not
19 substitute its judgment for that of the Commissioner.
20 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of*
21 *Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

22 The ALJ is responsible for determining credibility,
23 resolving conflicts in medical testimony, and resolving
24 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
25 Cir. 1995). The ALJ's determinations of law are reviewed
26 *de novo*, although deference is owed to a reasonable
27 construction of the applicable statutes. *McNatt v. Apfel*,
28 201 F.3d 1084, 1087 (9th Cir. 2000).

29 SEQUENTIAL PROCESS

30 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
31 requirements necessary to establish disability:

32 Under the Social Security Act, individuals who are
33 "under a disability" are eligible to receive benefits. 42
34 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
35 medically determinable physical or mental impairment"
36 which prevents one from engaging "in any substantial
37 gainful activity" and is expected to result in death or
38 last "for a continuous period of not less than 12 months."
39 42 U.S.C. § 423(d)(1)(A). Such an impairment must result
40 from "anatomical, physiological, or psychological
41 abnormalities which are demonstrable by medically
42 acceptable clinical and laboratory diagnostic techniques."
43 42 U.S.C. § 423(d)(3). The Act also provides that a

1 claimant will be eligible for benefits only if his
2 impairments "are of such severity that he is not only
3 unable to do his previous work but cannot, considering his
4 age, education and work experience, engage in any other
5 kind of substantial gainful work which exists in the
6 national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus,
7 the definition of disability consists of both medical and
8 vocational components.

9 In evaluating whether a claimant suffers from a
10 disability, an ALJ must apply a five-step sequential
11 inquiry addressing both components of the definition,
12 until a question is answered affirmatively or negatively
13 in such a way that an ultimate determination can be made.
14 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
15 claimant bears the burden of proving that [s]he is
16 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
17 1999). This requires the presentation of "complete and
18 detailed objective medical reports of h[is] condition from
19 licensed medical professionals." *Id.* (citing 20 C.F.R. §§
20 404.1512(a)-(b), 404.1513(d)).

21 It is the role of the trier of fact, not this court, to resolve
22 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
23 supports more than one rational interpretation, the court may not
24 substitute its judgment for that of the Commissioner. *Tackett*, 180
25 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
26 Nevertheless, a decision supported by substantial evidence will
27 still be set aside if the proper legal standards were not applied in
28 weighing the evidence and making the decision. *Browner v. Secretary*
29 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
30 there is substantial evidence to support the administrative
31 findings, or if there is conflicting evidence that will support a
32 finding of either disability or non-disability, the finding of the
33 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
34 30 (9th Cir. 1987).

35 ISSUES

36 The question is whether the ALJ's decision is supported by
37
38

1 substantial evidence and free of legal error. Plaintiff argues the
2 ALJ erred when he (1) disregarded the opinions of treating and
3 examining physicians regarding her physical conditions; (2)
4 discounted her testimony; and (3) assessed her RFC. She also
5 contends the ALJ erred by failing to order a consultative
6 examination by a gastroenterologist. (Ct. Rec. 13 at 9.)

7 DISCUSSION

8 A. Medical Opinions

9 Plaintiff argues the ALJ ignored the opinions of her treating
10 physician, James Chavez-Muramatsu, D.O., that she was limited to
11 sedentary work, and had postural limitations that would affect her
12 ability to perform work tasks. She contends reviewing agency
13 physician Howard Platter, M.D., and hearing medical expert David
14 Rullman, M.D., also found Plaintiff had limitations in handling and
15 fingering, but the ALJ failed to included them in the final RFC
16 determination. (Ct. Rec 13 at 13; Tr. 352-257; 337, 59-61.)

17 In a disability proceeding, it is the role of the ALJ to
18 resolve conflicts in medical evidence. A treating physician's
19 opinion is given special weight because of his or her familiarity
20 with the claimant and her physical condition. See *Fair v. Bowen*,
21 885 F.2d 597, 604-05 (9th Cir. 1989). If the treating physician's
22 opinion is not contradicted, it can be rejected only with "clear and
23 convincing" reasons. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.
24 1995). If contradicted, the ALJ may reject the opinion if he states
25 specific, legitimate reasons that are supported by substantial
26 evidence. See *Flaten v. Secretary of Health and Human Serv.*, 44
27 F.3d 1453, 1463 (9th Cir. 1995); *Fair*, 885 F.2d at 605.

1 State agency physicians such as Dr. Platter are considered
2 experts in the evaluation of medical issues in Social Security
3 disability claims. Their findings of fact must be treated as expert
4 opinion evidence of a non-examining acceptable medical source by the
5 ALJ, who must give specific, legitimate reasons for rejecting their
6 contradicted opinions. If uncontradicted, the reasoning must be
7 "clear and convincing." 20 C.F.R. §§ 404.1527(f), 416.927(f); SSR
8 96-6p. In addition, the analysis and opinion of a medical expert
9 selected by the ALJ may be helpful in adjudication. Testimony of a
10 medical expert may serve as substantial evidence when supported by
11 and consistent with other evidence in the record. *Andrews*, 53 F.3d
12 at 1041.

13 To meet his burden, the ALJ can set out a detailed and thorough
14 summary of the facts and conflicting clinical evidence, state his
15 interpretation of the evidence, and make findings. *Thomas v.*
16 *Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002); *Magallanes v. Bowen*, 881
17 F.2d 747, 751 (9th Cir. 1989). The ALJ is not required to accept the
18 opinion of a treating or examining physician if that opinion is
19 brief, conclusory and inadequately supported by clinical findings.
20 *Id.* Nonetheless, he must explain the weight given probative medical
21 evidence.

22 Historically, the courts have recognized conflicting medical
23 evidence, the absence of regular medical treatment during the
24 alleged period of disability, and the lack of medical support for
25 doctors' reports based substantially on a claimant's subjective
26 complaints of pain, as specific, legitimate reasons for disregarding
27 the treating physician's opinion. See *Flaten*, 44 F.3d at 1463-64;

1 *Fair*, 885 F.2d at 604. Even where an ALJ does not specifically
2 state that he rejects a physician's opinions, it is proper for a
3 reviewing court to draw inferences from the ALJ's discussion of the
4 physician's findings and opinion, if inferences are there to be
5 drawn. *Magallanes*, 881 F.2d at 755.

6 **1. Treating Physician James Chavez Muramatsu, D.O.**

7 The ALJ specifically referenced Dr. Chavez-Muramatsu's finding
8 that Plaintiff was limited to sedentary work. (Tr. 25.) He gave
9 this opinion little weight because it was inconsistent with clinic
10 notes showing mild to moderate pain; range of motion, balance, gait
11 and coordination in tact; normal fine motor skills and no sensory or
12 motor loss. (*Id.*) The record substantially supports the ALJ's
13 interpretation of Dr. Chavez-Muramatsu's clinic notes. (Tr. 363-
14 71.) For example, it is noted on review that in July 2008,
15 Plaintiff reported "infrequent" pain, and declined pain medication
16 because it made her sleepy. (Tr. 363.) However, later records show
17 she consistently complained of and was being treated conservatively
18 for chronic pain in her wrists and back. (Tr. 367-71.) The ALJ
19 reasonably found the pain reported was "mild to moderate."

20 Regarding the restriction to sedentary work, clinic notes do
21 not reflect problems with walking, standing or lifting. Gait was
22 consistently observed as normal. The ALJ properly gave more weight
23 to clinic notes than the check box form accompanying the physician's
24 records. *Crane v. Shalala*, 76 F.3d 251, 253 (9th Cir. 1996). The
25 ALJ's reasons for not giving Dr. Chavez-Muramatsu's sedentary level
26 opinion controlling weight are legally sufficient. See SSR 96-2p.

1 **2. Non-examining physicians Howard Platter, M.D., David**
2 **Rullman, M.D., and Ronald Klein**

3 The record shows agency reviewing physician Dr. Platter opined
4 Plaintiff had non-exertional limitations in her ability to finger
5 and handle due to bi-lateral carpal tunnel impairment. (Tr. 337.)
6 Although the ALJ found the RFC determination by Dr. Platter was
7 supported by the totality of the evidence, and appears to have given
8 it significant weight, he did not include non-exertional limitations
9 identified by Dr. Platter in the final RFC significant
10 determination. The ALJ found "claimant's testimony [is not]
11 entirely credible and since many of his [sic] complaints to his
12 [sic] doctors cannot be objectified, medical opinions not based on
13 objective medical findings were appropriately discounted for
14 purposes of this determination." (Tr. 25.) However, the non-
15 exertional limitations identified by Dr. Platter are supported by
16 reports from examining physicians Larry Lamb, M.D., in November
17 2007, (Tr. 398-99), and Cynthia Hahn, M.D., in March 2009. (Tr.
18 412-14.) The ALJ's reasoning is neither "clear and convincing" nor
19 sufficiently specific and legitimate to reject the fingering and
20 handling limitations assessed by Dr. Platter.

21 Likewise, at the hearing, medical expert Dr. Rullman testified
22 Plaintiff would have moderation limitations in her ability to finger
23 and possibly handle due to carpal tunnel symptoms. He noted obesity
24 may limit Plaintiff's work abilities. (Tr. 59-62.) The ALJ did not
25 reject this opinion and did not include it as a non-exertional
26 limitation in the RFC determination. *De novo* review also reveals
27 the ALJ neither accepted nor rejected medical expert testimony from
28 Ronald Klein, Ph.D. As found by the ALJ, Dr. Klein testified

1 objective tests indicate Plaintiff would have moderate limitations
2 in her ability to maintain attention and concentration for extended
3 periods, and she may be distracted occasionally by somatic symptoms.
4 (Tr. 20, 395-96.) These unrejected non-exertional limitations were
5 not included in the Commissioner's final RFC determination.

6 Although the ALJ is responsible for resolving conflicts in
7 medical evidence, he must explain with specificity the weight given
8 to opinions of acceptable medical sources. 20 C.F.R. §§ 404.1527,
9 416.927. Because the ALJ failed to evaluate with specificity the
10 opinions of Drs. Platter, Rullman, and Klein, the Commissioner's
11 decision is not free of legal error and cannot be affirmed.
12 Further, these errors cannot be considered harmless. An error is
13 harmless when the correction of that error would not alter the
14 result. See *Johnson v. Shalala*, 60 F.3d 1428, 1436 n.9 (9th Cir.
15 1995). Here, the ALJ neither rejected non-exertional limitations
16 assessed nor included them in the final RFC determination. If the
17 unrejected non-exertional limitations are credited and included in
18 the RFC assessment, the use of the Medical-Vocational Guidelines at
19 step five constitutes legal error requiring remand.

20 **B. Step Five - Use of the Medical-Vocational Guidelines**

21 At step five, the burden shifts to the Commissioner to show
22 that (1) the claimant can perform other substantial gainful
23 activity; and (2) a "significant number of jobs exist in the
24 national economy" which claimant can perform. *Kail v. Heckler*, 722
25 F.2d 1496, 1498 (9th Cir. 1984). The Medical-Vocational Guidelines
26 (Grids) is a matrix system developed by the Commissioner for
27 resolving cases that involve substantially uniform functional
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1 capacities. *Desrosiers v. Secretary of Health and Human Services*,
2 846 F.2d 573, 578 (9th cir. 1988). The Grids were adopted to improve
3 the efficiency of disability benefits proceedings. *Id.* Their use
4 was upheld as valid in *Heckler v. Campbell*, 461 U.S. 458 (1983).
5 However, the Grids are an administrative tool, and there are strict
6 limits on when the Commissioner may rely on them; the exclusive use
7 of the Grids is appropriate only where "a claimant's functional
8 limitations fall into a standardized pattern accurately and
9 completely described by the Grids." *Tackett*, 180 F.3d at 1103
10 (citing *Desrosiers*, 846 F.2d at 577). Where the Grids do not
11 accurately describe a claimant's condition, the Grids are used as a
12 "framework for decision-making," and vocational expert testimony is
13 required to determine if there are jobs in that national economy
14 that the individual claimant can perform. See *Polny v. Bowen*, 864
15 F.2d 661, 663-64 (9th Cir. 1988); SSR 83-12.

16 Where the Grids are not determinative, the Commissioner has the
17 burden of showing specific jobs within the claimant's capabilities.
18 See *Kail*, 722 F.2d at 1498. When a claimant cannot perform a full
19 range of work, her particular limitations, including pain, and their
20 impact on the ability to perform work activities must be evaluated
21 individually. SSR 83-12. A step finding based on unsupported
22 speculation regarding other work in the national economy is
23 insufficient to meet the Commissioner's burden at step five.
24 *Lester*, 81 F.3d at 832.

25 Here, at step five, the ALJ took "administrative notice" of
26 historical "expert vocational analysis." (Tr. 26.) Vocational
27 expert testimony is not a proper subject to be administratively or
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1 judicially noticed, is inadequate to satisfy a step five requirement
2 for vocational expert testimony, and is contrary to the
3 Commissioner's policy. SSR 83-10; SSR 83-12. The ALJ's failure to
4 call a vocational expert in this case is reversible error. *Tackett*,
5 180 F.3d at 1102-03.

6 As explained above, even where substantial evidence supports an
7 ALJ's decision, the decision must be set aside if proper legal
8 standards were not applied. *Brawner*, 839 F.2d at 433. Here,
9 without vocational expert testimony (or legally sufficient rejection
10 of non-exertional limitations assessed), the record is not clear as
11 Plaintiff's eligibility for disability benefits. Therefore, remand
12 for additional proceedings is warranted. See *Gonzalez v. Sullivan*,
13 914 F.2d 1197, 1202 (9th Cir. 1990). The court notes, however, that
14 the identified non-exertional limitations might not preclude the
15 ability to perform work activities; therefore, Plaintiff might not
16 succeed in proving she is disabled as defined by the Social Security
17 Act. *Hoopai v. Astrue*, 499 F.3d 1071, 1076 (9th Cir. 2007).

18 On remand, additional testimony may be taken, and Plaintiff may
19 submit additional relevant evidence. The ALJ will conduct a new
20 sequential evaluation, make new credibility findings, give legally
21 sufficient reasons for the rejection of probative evidence from
22 acceptable medical sources, and make new RFC findings, taking into
23 consideration the effects of pain and obesity. See SSR 02-1p. At
24 step five, vocational expert testimony should be obtained to
25 evaluate Plaintiff's exertional and non-exertional limitations in
26 combination and their effect on her ability to perform other work in
27 the national economy. Accordingly,

IT IS ORDERED:

1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 12**) is **GRANTED;**

2. Defendant's Motion for Summary Judgment (**Ct. Rec. 15**) is **DENIED;**

3. Application for attorney fees may be filed by separate motion.

The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. Judgment shall be entered for **PLAINTIFF**, and the file shall be **CLOSED**.

DATED November 18, 2010.

S/ CYNTHIA IMBROGNO
UNITED STATES MAGISTRATE JUDGE